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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

SEYMOUR R. THALER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, SEYMOUR R. THALER, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in these proceedings on March 5, 1973, which affirmed the judgment of conviction rendered against the petitioner and his two co-defendants Herbert R. Jacobs and Michael P. Lavelle.

OPINIONS BELOW

The petitioner was found guilty of substantive violations of 18 U.S.C. Secs. 2314 and 2315. While his two co-defendants were also found guilty of said substantive charges, as well as of the charge of conspiracy in violation of 18 U.S.C. Sec. 371, Thaler was acquitted on the conspiracy count. Counts four through seven of the indictment charged Thaler with having made perjurious declarations before the Grand

Jury in violation of 18 U.S.C. Sec. 1623, and he was convicted on Count Four.

Conviction was based on a jury verdict reported to Judge Murray Gurfein in the United States District Court for the Southern District of New York on March 23, 1972 and recorded at pages 2798-2799 of the trial minutes. On May 4, 1972, Thaler moved to set aside the jury's verdict and for a judgment of acquittal on counts Two, Three and Four. On July 15, 1972, Judge Gurfein denied said motion. His decision is set forth in Appendix A hereto.

Thereupon, Thaler was sentenced on August 8, 1972, to serve a year and a day, and to pay a fine of $10,000. The record of the sentencing is set forth at pages A 202 and A 218 of Volume I of the Joint Appendix.

On September 29, 1972, Thaler moved in the Court of Appeals for an order which would direct the government, as well as the co-defendant Jacobs and his attorney, to produce certain documents which had been received in evidence or marked for identification at the trial. By affidavit dated October 9, 1972, said motion was amended so as to pray for a new trial, or in the alternative, for a hearing with respect to Government's Exhibit 57 for Identification. Said motion was denied by the Court of Appeals with leave granted to argue the merits thereof in the course of the main appeal. The papers relating to said motion are set forth in the supplemental appendix filed by Thaler in the Court of Appeals.

On March 5, 1973, the Court of Appeals rendered its unanimous decision affirming said conviction and denying Thaler's two motions for a new trial. Said opinion is set forth

in Appendix B hereto.

JURISDICTION

The order of the Court of Appeals denying reargument is dated April 23, 1973. This petition for certiorari has been filed less than 30 days from the date aforesaid. Jurisdiction of the Court is invoked under Title 28 U.S.C. Sec. 1254 subd. (1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the charge of the trial court with respect to the proof required to establish Thaler's knowledge that the treasury notes were stolen, deny the petitioner a fair trial by shifting upon him the burden of proving lack of such knowledge, thereby destroying the presumption of innocence and relieving the government of the burden of proving guilt beyond a reasonable doubt?

2. Did the charge of the trial court on the conspiracy count incorrectly state the law with respect to the evidence required to establish a scheme to cause the treasury notes to be transported in interstate commerce?

3. Was the petitioner prejudiced by the failure of the trial court to dismiss the conspiracy count and thereby remove from the jury's consideration hearsay declarations which were admissible only on the theory that they were made in furtherance of the conspiracy?

4. Where virtually all of the testimony as to petitioner's alleged guilty knowledge and intent came from one co-de-

fendant and an alleged co-conspirator, and the testimony of another co-defendant which would have in large measure destroyed the testimony of Thaler's accusers was unavailable to Thaler at trial because of said co-defendant's exercise of his right against self incrimination, was there error in refusing to allow Thaler to present that evidence in affidavit form in post conviction motion for a new trial, when such evidence for the first time became available to Thaler?

5. Was Exhibit 57A lawfully admitted into evidence in spite of the extreme suspicion cast upon its authenticity? Was further error committed in the post-conviction proceedings when Thaler was denied a new trial to submit additional proof that said document was a forgery?

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portion of Amendment V provides: "No person shall *** be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

STATEMENT OF CASE

Before Thaler became involved in the transaction, and without his knowledge, $1.5 million of United States treasury bills, allegedly stolen, came into the possession of the defendant Lavelle in September, 1970. Lavelle asked his friend, the defendant Jacobs, to assist in selling them. Jacobs made several abortive efforts through a stock brokerage office and a savings bank; he then consulted with his attorney David Altschul who shared office space with the petitioner Thaler. Altschul was also indicted, but his case was severed because

he testified on behalf of the government.

Thaler testified in his defense that he had never met Lavelle; that he knew nothing of the alleged origin of the transaction; that he understood that Jacobs was indeed the owner of the bonds; and that his attorney Altschul would be acting on Jacob's behalf, as agent of an undisclosed principal, because Jacobs did not want his participation in the sale to be known. Thaler contended that he relied on oral representations made by Altschul, an attorney who shared his office, and on written documents which Altschul executed to consummate the actual sale of the securities.

Thaler, was of course suspicious at the outset that there might be something wrong with the treasury bills because Jacobs was willing to part with them at such a high discount. But, as the transaction progressed, such suspicions were set to rest by statements made by a Vice-President of the Chemical Bank, and by advice given by two former district attorneys. Thaler was satisfied thereby that it was not unusual for circumstances to exist where an owner would sell such securities at a high discount; and that no crime would be committed by the purchaser so long as he knew the identity of the seller and relied on his honesty. Thaler knew only that the seller was Jacobs, whose family had been life-long clients of Altschul; and that Altschul vouched for Jacobs, both orally and in writing.

When Altschul asked if Thaler knew somebody who would buy said treasury bills, Thaler approached his friend and client, Fred Hill. Together they spoke with Fitzgerald at the Chemical Bank who assured them that if the bills were put in for collection, any illegitimacy therein would be

detected by the Federal Reserve Bank. While Hill originally planned to pay for the bills upon delivery, the parties followed Fitzgerald's advice that payment be deferred until proceeds were collected.

Thereupon Thaler received from Jacobs a number of the treasury bills. Altschul, acting as agent for the undisclosed principal, executed bills of sale to Hill, identifying himself as the seller. Thaler entered into an agreement with Hill that the profits would be split equally between them.

$350,000 of said bills were delivered to Chemical Bank for collection on October 5, 1970. Among them were several already past due, and several which would mature on November 5, 1970. Two days after deposit, Fitzgerald communicated that the Federal Reserve Bank would not accept the past due bills without receiving a certificate of ownership. Hill thereupon executed such document. On October 14, 1970, Fitzgerald communicated that a certificate of ownership was also required from Altschul, the source from which Hill had purchased them. Altschul agreed to sign one. Jacobs, however, declined to do so. Such refusal did not create a doubt in Thaler's mind as to the legitimacy of the securities, because the whole purpose of the transaction was to conceal the identity of Jacobs as the seller. However, at that juncture, Hill decided to drop out of the deal.

All of the treasury bills were then returned to Jacobs. Thereafter, Thaler approached a friend and client named Brassner, and Thaler offered him the same deal that he had offered to Hill. $250,000 of bills, due to mature on November 5, 1970, were then redelivered to Thaler, and turned over to Brassner. In connection therewith, Altschul executed a new

bill of sale to Brassner, again identifying himself as the owner.

Brassner, who conducted a business in Connecticut, transported said bills to a bank in that state, without the knowledge or intent of any of the parties in the transaction that he would cross state lines to effect a redemption of the securities.

This act became one of primary importance so far as the conspiracy count was concerned. The trial judge took the position that federal jurisdiction existed over the substantive counts whether or not the parties intended to transport the securities in interstate commerce; however, the alleged conspiracy to violate the substantive statutes did require such intent. The Connecticut bank transmitted $250,000 of treasury notes to the Federal Reserve Bank in Massachusetts, and within a week they were paid.

Thaler, as per agreement, received 50% of the profit earned by Brassner. In respect of the proceeds received by Altschul, it was Altschul, as the seller, who disbursed same. Thaler denied any knowledge as to how Altschul made out the checks. He did not know that a check for $62,500, drawn to Jacobs, was in fact intended for Lavelle, whose participation in the deal was never disclosed to Thaler. Nor was Thaler ever told that a check in the sum of $8,334 was drawn to Jacobs as his share of a finder's fee. Whatever arrangement was made privately between Altschul and Jacobs, with respect to their conduct as brokers between Lavelle and the purchaser, was never disclosed to Thaler, who operated throughout in the belief that Jacobs was the owner.

The facts, as briefly summarized above, indicate a close

issue of fact as to whether Thaler had actual knowledge that the treasury bills were stolen. He was entitled to have that issue resolved by a jury that would be properly instructed on the subject of guilty knowledge, and that would not retire into the jury room under a misconception that the law required the accused to satisfy them that he actually believed that the securities were not stolen. The burden of proving knowledge beyond a reasonable doubt was imposed upon the government both by the applicable substantive statutes and by the constitution. The trial judge had no power to shift that burden to Thaler.

Thaler attempted to meet that burden by insisting throughout that the party whom Altschul disclosed to him as the owner was Jacobs. The government sought to destroy that contention by offering in evidence a document (Exhibit 57A) which showed a three-party arrangement to share a finder's fee, the parties being Thaler, Altschul and Jacobs. Thaler condemned said document as a forgery and presented strong evidence to sustain his position. Indeed, the exhibit was not the original document, but an alleged photocopy thereof; and the evidence showed that such a "mockup" could easily be fabricated on a photocopy machine. The evidence showed testimony by Jacobs before the grand jury wherein he denied on several occasions that any such agreement existed. The first time it appeared was in the course of the trial when Jacobs was being cross-examined by the government.

The trial court should have kept the exhibit from the jury by making a judicial determination that it was inadmissible as secondary evidence. Instead, the exhibit was admitted, with an instruction that the jury should determine whether it was authentic. With said exhibit before it, Thaler's protestations of lack of knowledge became a voice crying in the wilderness.

REASONS FOR GRANTING THE WRIT

A. *The Court's Charge with respect to guilty knowledge:*

In his instructions to the jury on the subject of guilty knowledge, the trial judge included the following statement:

> "However, it is not necessary that the government prove to a certainty that a defendant knew the bills were stolen. Such knowledge is established if the defendant was aware of a high probability that the bills were stolen, unless the defendant actually believed that the bills were not stolen."

The language with respect to "high probability" and "unless the defendant actually believed" were taken from the Model Penal Code 27. Said proposition has been noted by this Court in *Leary v. United States*, 395 U.S. 6 (1969) and in *Turner v. United States*, 396 U.S. 398 (1970). In both decisions, interpreting narcotics statutes, the Court was concerned with the presumption of guilty knowledge which flows from possession, unless the defendant explains such possession by facts and circumstances which are consistent with innocence. In *United States v. Matalon*, (1970) 425 F. 2d at page 72, the Second Circuit pointed out that in *Leary*, the Supreme Court had declined to decide whether a criminal statute which passes muster when judged by the "more likely than not" standard must also satisfy the "reasonable doubt" standard.

In the instant case, the trial judge did not charge that guilty knowledge could be inferred from possession. Judge Gurfein stated that such doctrine was inapplicable to this case and would mislead the jury. Nevertheless, he charged "high

probability". Thaler's counsel excepted thereto on the ground that the statute required the government to prove knowledge beyond a reasonable doubt.

The jury interrupted its deliberations and requested the Court to repeat its instructions on what constitutes "reasonable knowledge". The jury asked what elements it should consider in deciding whether a person can reasonably have been expected to know that the securities in this case were stolen. In answering the jury's questions, Judge Gurfein repeated the high probability doctrine, not once but twice. In responding to questions asked by the jury after it had been deliberating for several hours, the trial judge was under a special duty to clarify the law with respect to guilty knowledge. In *Bollenbach v. United States*, 326 U.S. 607, 612, this court stated:

> "Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

Petitioner contended in the Court of Appeals that a high probability charge might have a rational basis if it was given in connection with a statute, like the one interpreted in *Turner*, where Congress specifically provided that the inference of guilty knowledge could be drawn from the fact of possession. However, in the absence of such a statute, and even in the absence of a charge stating the common law presumption applicable to possession, there was no justifiable reason for injecting the high probability charge into the case.

The Court of Appeals manifestly did not approve the "high probability" instruction (Item VI of Decision). It stated

that a good legal definition is not necessarily appropriate as a charge; "and we can think of cases where *sole reliance* on the A.L.I. language might be improper." The Court of Appeals then held that the trial judge instructed the jury as to other correct doctrines applicable to guilty knowledge, so that the jury was made well aware that it must decide whether the defendants actually knew that the bills had been stolen, or manifested by their conduct that they were deliberately shutting their eyes to what they had every reason to believe was the fact.

In Item III of its decision, the Court of Appeals reviewed the evidence applicable to Thaler's guilty knowledge and determined that it had been sufficiently established to warrant a conviction under the doctrine of possession and the inference to be drawn therefrom, a doctrine which the jury never heard. In said decision the Court of Appeals virtually conceded that the burden of proof had been shifted upon the defendant when it stated:

> "Moreover, the government in this case introduced substantial evidence to rebut the defendants' attempts to demonstrate innocent possession."

The Court of Appeals erred in its determination that the prejudicial effect of the high probability charge was overcome by other statements in the total charge. Constitutional error must be harmless beyond a reasonable doubt before it can be disregarded *(Chapman v. State of California,* 386 U.S. 18; *Stump v. Bennett* (8th Cir. 1968) 398 F. 2d 111, 121, cert. den. 89 S. Ct. 48 3). In this case a reasonable doubt as to prejudicial error certainly exists. The jury was instructed that guilt must be proved beyond a reasonable doubt. But in the

same charge it was instructed that proof need only be established to a high probability. Similarly, the jury was instructed that the burden of establishing guilt is upon the government. But in the same charge it was instructed that guilty knowledge was proved unless the defendant met the burden of persuading the jury that he did not actually believe the bills had been stolen.

Instructions must be consistent with each other and not misleading. The fact that one instruction is correct does not cure the error in a second instruction which is inconsistent with the first (*Perez v. United States* (5th Cir. 1961) 297 F. 2d 12, 16; *Smith v. United States,* (6th Cir. 1956) 230 F. 2d 935) In no circumstances is it permissible to leave the jury with the idea that it had become the duty of the defendant to establish innocence (*Ezzard v. United States* (8th Cir. 1925) 7 F. 2d 808; *United States v. Hayward* (D.C. Cir. 1969) 420 F. 2d 142).

It is highly significant that this Court granted certiorari in *United States v. Barnes* (9th Cir. 1972) 466 F. 2d 1361, cert. granted 93 S. Ct. 544). It was contended in said case that the decisions in *Leary* and in *Turner* required rejection of a charge that guilty knowledge may be inferred from possession. Indeed, the Fifth Circuit rejected such a charge as violative of due process in *United States v. Cameron* (1972) 460 F. 2d 1394.

The "high probability" charge in the instant case is even more deserving of this Court's disapproval. Said charge permitted the government to establish guilty knowledge by a standard of high probability, thereby impinging upon the constitutional standard of "beyond a reasonable doubt". In *In*

Re Winship (1970) 397 U.S. 358, 364 this Court stated:

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged".

The presumption of innocence is axiomatic and elementary, and its enforcement lies at the foundation of the administration of criminal law *(Coffin v. United States,* 156 U.S. 432.) The due process clause is violated when the burden of persuasion is shifted upon the defendant to disprove essential elements of the crime *(Morrison v. People of State of California,* 291 U.S. 82, 96; *Bollenbach v. United States* (1946) 326 U.S. 607; *Wilbur v. Mullaney* (1st Cir. 1973) 473 F. 2d 943).

A charge which requires a defendant to go forward with proof of his innocence violates the constitutional protection that no man may be compelled to testify against himself in a criminal case *(United States v. Jackson* (1968) 390 U.S. 570; *Simmons v. United States,* 390 U.S. 377).

B. *The Court's Charge with respect to the Conspiracy Count.*

While Thaler was acquitted on the conspiracy count, he suffered prejudice by reason of the admission into evidence of numerous hearsay declarations made by the co-conspirators. Had the trial judge dismissed the conspiracy count prior to submission, he would have had to instruct the jury to disregard such declarations. Indeed, upon Thaler's acquittal of

conspiracy, the trial judge should have recognized that guilt on the substantive counts was in good measure predicated upon such hearsay. Vacating the verdict against Thaler was warranted in such circumstances.

The jurisdictional issue in the conspiracy count was whether the parties intended that the securities should cross state lines in order to be redeemed. The evidence was clear that no one knew that Brassner would deposit the bills in a Connecticut bank. It was their intention that the bills should be redeemed in a Federal Reserve Bank, and said act did not require the bills to be transported in interstate commerce. The trial judge, however, instructed the jury that since the securities could also be redeemed by the Treasurer of the United States in Washington, the jury could find that the parties so intended. Said proposition was rejected in *United States v. Teresa* (4th Cir. 1969) 420 F. 2d 13, 17.

The conspiracy count is discussed in Item IV of the Court of Appeals decision. The Circuit Court pointed out that federal jurisdiction did not exist by reason of the possibility that the bills could be redeemed in Washington, when the evidence established that the parties intended to cash the bills in a Federal Reserve Bank without crossing state lines. Nevertheless, the Court held that under Title 18 U.S.C. Section 371, the jury could have found the defendants guilty of conspiracy to defraud the United States.

The jury was instructed on both theories, the transportation to Washington and the fraud. The Court of Appeals noted the rule that when two instructions are given, one of which is erroneous, it is impossible to tell which instruction the jury followed. The Court then held that said rule does not

apply here because the evidence supported a conclusion that the defendants had entered into an agreement to defraud the United States. In view of the authorities cited in the decision itself, such determination constitutes a preemption by the Court of the function to be performed only by the jury.

The resolution of the issue in the conspiracy count was not warranted under the decision of the Second Circuit in *United States v. Bottone*, 365 F. 2d 389, cert. den. 385 U.S. 974 (1966). In said case, several of the counts in the indictment charged the defendants with transporting stolen biological cultures, together with documents as to their nature. One count of the indictment, however, did not mention the documents. The issue was whether the cultures themselves were of a monetary value within the statutory minimum. The Court of Appeals held that by finding guilt on said count, the jury necessarily determined that the cultures themselves satisfied the statutory minimum. The Court concluded that guilt could have been found on the other counts as well, solely on the value of the cultures, without reference to the documents.

It does not appear that the decision in *Bottone* reaches the issues in the instant case, where one of the two instructions on conspiracy was determined by the Court of Appeals to be erroneous.

Under the heading "Questions for Review" petitioner listed items 4 and 5 which relate to the Lavelle post-conviction affidavit, and to the erroneous determinations in connection with Exhibit 57A, both at the trial and thereafter.

No argument on those issues will be presented in this petition. However, if certiorari should be granted petitioner will present his contentions thereon in the appeal.

CONCLUSION

PETITIONER RESPECTFULLY PRAYS THAT THIS COURT SHOULD REVIEW THE DETERMINATION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT BY GRANTING A WRIT OF CERTIORARI.

Respectfully submitted,

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DECISION OF JUDGE GURFEIN DATED JULY 15, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

DAVID ALTSCHUL, HERBERT R. JACOBS,
MICHAEL P. LAVELLE and SEYMOUR R. THALER,

Defendants.

APPEARANCES

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New York, New York

GURFEIN, D. J.

Seymour Thaler was convicted by a jury of knowingly selling or disposing of stolen securities, knowing transporta-

tion of those securities and one count of perjury. He was acquitted of conspiracy and two counts of perjury. He now moves for a judgment of acquittal or for a new trial.

I

While he raises other questions as well, the most important issue raised concerns the admission into evidence of Government's Exhibit 57A, an alleged error on which Thaler moves for a new trial under Fed. R. Crim. P. 33. Although one cannot be certain that the result would have been different if Exhibit 57A had been excluded, it was a strong piece of corroborative evidence against Thaler. To understand the circumstances of the Government's offering it in evidence, some recital of the facts is necessary.

Thaler, Jacobs and Lavelle were co-defendants in the trial. Jacobs and Lavelle were convicted of conspiracy and the substantive counts. Altschul is an alleged co-conspirator, named as a defendant in the conspiracy count, but his case was severed from that of the other defendants. Altschul testified as a witness for the Government. As will later appear, Jacobs testified as a witness on his own behalf.

The charges against Thaler were that he sold or disposed of stolen United States Treasury Bills moving in interstate commerce and that he transported them in interstate commerce, knowing them to have been stolen (18 U.S.C. §§2315, 2314). On the perjury charge upon which he was convicted, the jury found that Thaler had lied when he testified before the Grand Jury that there had never been an agreement splitting the "commission" on the Treasury Bill transaction, one-third each to Altschul, Jacobs and Thaler

himself. The materiality of the perjury lay in the circumstance that Thaler had sworn before the Grand Jury that he believed Jacobs was the owner of the Treasury Bills, that Jacobs was a client of Altschul, a lawyer who shared an office with Thaler, and that Thaler, therefore, believed Jacobs was a 'egitimate businessman. Thaler swore that he had never met Lavelle, the man who brought the Treasury Bills to Jacobs, who brought them to Altschul, who, in turn, showed them to Thaler. The jury acquitted him of perjury on these oaths that he had believed Jacobs to be the owner of the bills and that he had never met Lavelle.

If, indeed, Thaler believed that the bills belonged to Jacobs, the jury might have found in his favor on the substantive counts, but not necessarily so, because of the other suspicious circumstances like the size of the discount – seventy-five per cent from the face value. Altschul testified that for the original $800,000 worth of Treasury bills, Lavelle was to be paid twenty-five per cent of the face value (Tr. 151-54). There was to be a ten per cent finder's fee for Jacobs, which Jacobs later agreed to share equally with Altschul and Thaler. Altschul testified that this agreement was reduced to a writing, signed by Altschul, Jacobs and Thaler, which provided that each would receive one-third of $80,000 (186, 192-94). It is quite evident that if Thaler knew Jacobs was participating as a broker or finder, Jacobs was presumably not himself the owner. This would have logically required Thaler to find out something about the source of the bills, assuming that Thaler was telling the truth when he said he had not met Lavelle. Jacobs swore to essentially the same story as did Altschul about the commission agreement (1626-27, 1662-66).

Altschul further testified that in October 1970 Thaler requested that the written agreement be returned to him, since it had been determined that only *unmatured* Treasury bills would be put in for collection and there were only $250,000 worth of those out of the original batch of $800,000 (256-57). Altschul testified that Jacobs either brought his copy to Altschul or Thaler, or Jacobs destroyed his copy at Altschul's request (574-77). Altschul stated that to his knowledge no copy of the agreement survived (190-91). Jacobs testified that he had destroyed his copy at Altschul's request (1666-67). Jacobs' Grand Jury testimony had been the same. Jacobs had also told the Grand Jury that he retained no copy of the agreement (1843).

At the trial, Altschul was permitted to testify to the contents of the "commission agreement" upon his testimony that no copy survived (190-94), although there was an objection by Thaler's counsel to the oral recital on the basis of the best evidence rule (188). However, that objection did not rest on the proposition that the deliberate destruction of the original made secondary evidence inadmissible.

After the Government rested, Jacobs took the stand in his own behalf. On the direct examination he made no mention of what is now Exhibit 57A. On cross-examination by Assistant United States Attorney Shaw, Jacobs was asked about the commission agreement. Thaler's counsel interposed an objection on the "best evidence" ground (1665). The Court suggested that the prosecutor ask whether the witness "still has a copy" in order to lay the foundation that no copies were in existence as Altschul had testified (id.). Shaw asked Jacobs whether he ever had more than the one copy of the original commission agreement which he had destroyed.

Jacobs replied, to the obvious surprise of the Government, that he had made a photocopy before he destroyed his copy (1667). In the face of this surprise, the Assistant United States Attorney asked Jacobs in a series of questions where the photocopy was. Jacobs calmly replied: "In my pocket" (1668). Upon request from the Government, and with the approval of the Court, he produced a photocopy (1671).

The Government offered it in evidence (1672). Thaler interposed no objection at that time (1673). The Court admitted the photocopy as Exhibit 57A (1673); and when a motion was later made to strike the exhibit on the ground that Jacobs, having admitted its destruction, could not thereafter bring in a copy (2312 ff), the Court ruled that the document was admissible and denied the motion (2323).

In the charge to the jury the Court, *sua sponte*, told them that there was evidence that the destruction of the agreement by Jacobs occurred almost a year before any investigation was known to him and at a time when the $800,000 transaction was no longer active, but that if the jury believed that Jacobs destroyed his copy with fraudulent intent they should disregard Exhibit 57A in their deliberations (2751). As we shall see, this charge was more favorable to Thaler than was required.

Thaler now urges that unless the Government rebutted to the trial judge's satisfaction every reasonable suspicion of fraud, the exhibit should have been excluded. Thaler argues that the Government had not succeeded in rebutting the suspicion of fraud because of the circumstances of Jacobs' destruction of the original, the circumstances of his production of the photocopy, and the intrinsic untrustworthiness of

the photocopy itself.

Thaler fails to differentiate between Jacobs, the witness, and the Government, the proponent. He also fails to distinguish between the rule applicable to the authenticity of the copy and the rule applicable to the receipt in evidence of a copy. The latter is a question for the Court – whether to admit a copy in the light of the circumstances surrounding the destruction of the original. The former question – whether the photocopy is authentic – like the authenticity of any other document offered in evidence, goes to its weight and is for the jury.

The origins of the best evidence rule are somewhat obscure. See 4 Wigmore on Evidence § 1177 (3d ed. 1940). And since photocopies have come into universal use the reason behind the rule has been eroded. McCormick on Evidence 567-69 (2d ed. E. Cleary 1972). There is difficulty, moreover, in reading the opinions of the few cases on the issue before this Court because judges have not always been precise in language where the nuances are both wide and subtle.

Generally speaking, the best evidence rule requires the production of the original document. However, the rule is subject to the major exception that where the judge finds that the original was lost or destroyed, secondary evidence can come in; but the exception must in turn be qualified when the proponent was responsible for the destruction of the original. The formulation by McCormick of this exception to the exception seems as sensible as any: "If the original document has been destroyed *by the person who offers* evidence of its contents, the evidence is not admissible unless,

by showing that the destruction was accidental or was done in good faith, *without intention to prevent its use as evidence*, he rebuts to the satisfaction of the trial judge, any inference of fraud." McCormick, *supra*, at 571 (emphasis added).[1]

The thrust of Dean McCormick's formulation is two-fold: (1) the destruction would compel the exclusion of the copy only if there was intention *to prevent its use as evidence; and* (2) the document must have been destroyed *by the person who offers* evidence of its contents.

As to the first branch of the test, it is difficult to conclude that Jacobs acquiesced in the destruction of the original *to prevent its use as evidence*. There was no legal proceeding pending or in contemplation at the time of the destruction. In any event, as the trier of the preliminary question of fact, the Court accepts Jacobs testimony that he did not conceive the idea of destroying his copy but simply went along with the others.

As to the second branch of Dean McCormick's test, it is apparent that it was not Jacobs, the destroyer of the original, but rather the Government that offered the exhibit; and it is, indeed, marked as a Government exhibit.[2] Research has failed to disclose any authority that requires or even suggests the exclusion of a copy when the original was destroyed, not by the proponent, but by an unrelated third person.

On the other hand, there is authority in this Circuit which holds the contrary. In *United States v. Knobl*, 379 F. 2d 427, 441 (2 Cir.), *cert. denied*, 389 U.S. 973 (1967), the Government offered a copy of a tape recording where the original tape made by the Government witness, Mrs. Fuller,

was left in her hands and disappeared. Appellant Knohl argued that the Government was inexcusably negligent in leaving the original tape in Mrs. Fuller's hands and should have, therefore, been held accountable for its loss or destruction under the best evidence rule. The Court of Appeals, held, however, that "it was not the Government, who was the proponent, that was at fault in the loss of the original, but Mrs. Fuller herself." It was held that the secondary evidence tendered by the Government and not by Mrs. Fuller had been properly admitted. The point had been previously adumbrated by the Second Circuit: "destroyed without the connivance of the proponent," *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 265 F. 2d 418, 423 (2 Cir. 1959); by the First Circuit: "There is no basis for claiming any wrongful disposition of these records *by Government agents*," *Tallo v. United States*, 344 F. 2d 467, 470 (1965) (emphasis added); and especially by the Eighth Circuit: "destruction was not caused by the voluntary act of the *party* who subsequently proffers secondary evidence; ...the penalties...are personal" *McDonald v. United States*, 89 F. 2d 128, 137, *cert. denied*, 301 U.S. 697 (1937) (holding that even destruction of money by *federal* Treasury agents was not an act of the United States as a *party*). In fact, the rule is an old one. See *Miller v. State*, 110 Ala. 68, 86, 20 So. 392 (1896). And it has been reaffirmed in *United States v. Maxwell*, 383 F. 2d 437, 442 n. 3 (2 Cir. 1967), *cert. denied*, 389 U.S. 1057 (1968). There the Court stated "that secondary evidence is admissible...except where the unavailability is caused by the proponent's purposeful design to prevent production of the primary evidence" – essentially the formulation of Mc Cormick.[3]

In the matter before us it was not Jacobs but the

Government who was the proponent, and the rule of the *Knobl* case applies. The case at bar actually is no different from what it would have been if the Government had obtained Exhibit 57A from Jacobs by the discovery process, either during the Grand Jury proceeding or in the pre-trial phase. In that event, the proponent clearly being the Government, a defendant could not successfully object to its introduction upon the ground that a co-defendant, without the connivance of the Government, had destroyed the original, judge, the secondary evidence is intrinsically no more suspect than any other evidence. If the copy is in fact suspect, the attack upon it, as distinct from the preliminary question regarding the destruction of the original by the proponent, is for the jury. The Court believes it appropriately charged Thaler's contentions in this respect (2716-20).

In summary, then, there was no violation of the best evidence rule in admitting Government's Exhibit 57A because it was established that the original was destroyed and because the Government had no burden to rebut any suspicion of fraudulent destruction. At any rate, it was not established that Jacobs did destroy the original to prevent its use in evidence. Any doubts as to the authenticity of the copy go only to the weight to be given the exhibit, a question for the jury on which they were adequately charged.

II

The defendant Thaler, however, belatedly offers in support of his motion for a new trial the affidavit of a document expert that Exhibit 57A was typed on Altschul's typewriter, thereby appearing to contradict Altschul who had testified that Thaler presented the original agreement to him (194). In

view of the fact that Thaler used Altschul's secretary on occasion (1939-40, 2107), the new evidence is utterly equivocal. It may be thought to point more to authenticity than not.

Thaler also offers an affidavit from an expert on photocopy paper to prove that Exhibit 57A is not Royfax paper, the paper used in servicing the photocopy machines near Jacobs' office at the time of Jacobs' alleged making of the photocopy (2385-88). This evidence is far from sufficient to warrant a new trial. First, there was no unequivocal testimony by Jacobs of where the photocopy was made. He thought he gave it to his secretary to copy, but he apparently did not know which copying machine she used (1669, 1842). Second, evidence that the copying machines closest to Jacobs' secretary used only Royfax paper and that Exhibit 57A was not on Royfax paper was admitted and then submitted to the jury (2385-406). In view of the absence of proof of lack of access to other copying machines, the proferred testimony is not material; in any event, it would be cumulative with regard to the testimony which the Court submitted to the jury on Thaler's behalf.

III

Thaler has presented an affidavit from co-defendant Lavelle, who was convicted at the same trial of the conspiracy and substantive counts, to the effect that Lavelle met Thaler casually and only once, and that, contrary to the testimony of Altschul and Jacobs, there was never any discussion between Thaler and Lavelle regarding the Treasury bills.[4]

We may note at the outset that Thaler was acquitted on

the perjury charge relating to his knowing Lavelle and discussing the Treasury bills with him. Thaler was also acquitted on the conspiracy count in which Lavelle was named and tried as a co-conspirator. Thaler could properly have been convicted on the substantive counts even if there was no proof that Thaler knew of Lavelle's existence. The acquittal on the perjury count concerning Lavelle makes it quite clear that the jury did not consider the relations of Thaler with Lavelle an essential or proven element of the Government's case on the substantive counts. It cannot be assumed, therefore, that if Lavelle had testified that he had never discussed the Treasury bills with Thaler, it would have had any effect on the jury's view of Thaler's guilt on the substantive counts.

The requirements for the granting of a motion for a new trial are that: (1) the evidence be discovered since trial; (2) the evidence be material; and (3) the evidence would probably result in acquittal upon retrial. *United States v. Polisi*, 416 F. 2d 573, 576-77 (2 Cir. 1969). For the reasons stated I cannot find that Lavelle's testimony, even if believed, would probably result in acquittal; nor does his word against Altschul and Jacobs make them perjurers.[5]

In any event, the contrary result would be dangerous precedent since it would permit, in a more common type of case, convicted co-conspirators to support new trials simply on the subsequent assertion that they had not known or conversed with a co-conspirator. In many conspiracy cases there is an issue as to association among co-defendants. The proposition now urged amounts to no more than this: if one of the convicted co-conspirators swears that he did not know or converse with another convicted co-conspirator and would have so testified except for his own privilege against self-in-

crimination, a new trial should be granted. This offends "the strong policy underlying the desired finality of judgments," *Polis, supra,* at 577. The inability of one co-defendant to call another as a witness on his own behalf is a problem central to the nature of the conspiracy charge. That is true in every conspiracy case, and the great effort which counsel for a defendant must make in attempting to obtain the testimony of an alleged accomplice and, hence, preserve his rights has recently been noted by our Court of Appeals. See *United States v. Sanchez,* Slip Op. 2909 (May 2, 1972). There the issue was the prompt disposition of criminal cases, which was seen as sufficient reason to forego the proffered testimony. Here the issue is finality of judgments. Policy commands the same result for it does not raise the spectre of convicting the innocent, or otherwise go "to the heart of the fairness of the trial" (id.).

IV

The other grounds on which Thaler moves for a judgment of acquittal or a new trial are not persuasive. These motions are, therefore, denied in all respects.

It is so ordered.

s/D. J. Gurfein
U.S.D.J.

Dated: July 5, 1972

FOOTNOTES

1. *Accord, United States v. Maxwell*, 383 F.2d 437, 442 n.3 (2 Cir. 1967), *cert. denied*, 339 U.S. 1057 (1968); 4 Wigmore on Evidence §1198 (3d ed. 1940); Proposed Federal Rule of Evidence 1004(1), 51 F.R.D. 315, 459 (1971); Uniform Rule of Evidence 70(1)(a).

2. If Jacobs were offering the exhibit for his benefit, then the Government would have a best evidence objection that would at least pass the second branch of the test. But the issue on this motion is the use by the Government against Thaler, with Jacobs not involved.

The fact that the destruction was by a co-defendant is quite irrelevant. In fact, it is much more illogical to attribute Jacobs' destruction to the adversary prosecutor than it would have been to attribute the destruction by a Government witness or agent to the prosecutor, an attribution the *Knohl* and *McDonald* courts, *infra*, refused to make.

3. While there is a statement in *Knohl, supra*, at 441, that secondary evidence is admissible "provided the copy does not otherwise appear to be untrustworthy," the language, with respect, appears to have been dictum. It was apparently intended to meet the argument in the *Knohl* case that a copy of a tape could have been subject to erasures that were not susceptible to detection. The argument was rejected as speculative, since the second tape did not otherwise appear to be untrustworthy. The language could hardly have been intended as of general application, for the traditional inquiry under the best evidence rule relates only to the circumstances of the destruction, not to the authenticity of the copy. See, e.g., Levin, Authentication and Content of Writings, 10 Rutgers L.Rev. 632, 644 (1956), United States v. Maxwell, *supra*.

4. There is also a new affidavit by Joseph Eisinger, who shares offices with Altschul and Thaler, to the effect that Thaler did not know of Lavelle. It is subject to the same considerations and treatment as the Lavelle affidavit, as well as perhaps being objectionable on other grounds.

5. Thus, the special rule that governs where the trial judge is satisfied that the conviction was based in part on perjured testimony – in which case a new trial is necessary if the jury *might* not have convicted without the perjury – does not come into play. See *Polisi, supra*, at 577-78.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 543, 544, 545 – September Term, 1972.

(Argued January 19, 1973 Decided March 5, 1973.)

Docket Nos. 72-1897
72-2006
72-3218

UNITED STATES OF AMERICA,

Appellee,

v.

HERBERT R. JACOBS, MICHAEL P. LAVELLE
and SEYMOUR R. THALER,

Defendants-Appellants.

Before:

FRIENDLY, *Chief Judge,*
OAKES and TIMBERS, *Circuit JUDGES.*

Appeal from a judgment of the District Court for the Southern District of New York, Murray I. Gurfein, *Judge,* convicting appellants Herbert R. Jacobs, Michael P. Lavelle and

Seymour R. Thaler of various crimes relating to dealings in stolen United States Treasury Bills and an order denying motions of Thaler and Lavelle for a new trial.

Affirmed.

JOHN W. NIELDS, JR., ESQ., Assistant United States Attorney (Whitney North Seymour, Jr., Esq., United States Attorney for the Southern District of New York, Edward J. Kuriansky, Esq. and Michael B. Mukasey, Esq., Assistant United States Attorneys, of Counsel), *for Appellee.*

HENRY J. BOITEL, Esq., New York, N.Y., for *Appellant Jacobs.*

JOSEPH L. BELVEDERE, Esq., Brooklyn, N.Y., *for Appellant Lavelle.*

J. STANLEY SHAW, Esq., New York, N.Y. (Jesse I. Levine, Esq. and Irving L. Weinberger, Esq., of Counsel), *for Appellant Thaler.*

FRIENDLY, *Chief Judge:*

Appellants were tried in the District Court for the Southern District of New York before Judge Gurfein and a jury, on a six-count superseding indictment. Count 1 charged appellants Jacobs, Lavelle and Thaler with conspiring with David Altschul in violation of 18 U.S.C. §371[1] either to violate 18

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1. The trial of Altschul, who was named only in the conspiracy count, was severed; he testified as a Government witness.

U.S.C. §§2314 and 2315, relating, among other things, to dealings in stolen securities – in this instance United States Treasury Bills – which have moved or are to move in interstate commerce or to defraud the United States by causing treasury bills to be presented for payment, knowing that they had been stolen. Jacobs and Lavelle were convicted but Thaler was acquitted on this count. Counts Two and Three charged Jacobs, Lavelle and Thaler with substantive violations of 18 U.S.C. §§ 2314 and 2315; all were convicted on both counts. Counts Four through Seven charged Thaler with making various false material declarations before the grand jury in violation of 18 U.S.C. § 1623. He was convicted on Count Four, relating to a statement that he had not entered into a commission agreement with Altschul. He was acquitted on Counts Five and Six, which charged him with having falsey told the grand jury that Altschul had indicated to him that Jacobs was the owner of the bills and that no one had ever indicated that Jacobs was acting for anyone else, and with having falsely denied ever meeting Lavelle. Count Seven had been dismissed during the trial.

Lavelle later moved for a judgment of acquittal on the conspiracy counts and a new trial on the two substantive counts on which he had been convicted; Thaler moved for a judgment of acquittal on all counts or, in the alternative, for a new trial based, *inter alia*, on newly discovered evidence. The judge denied both motions.

Defendants received relatively light sentences – Jacobs one year and one day on each of the three counts on which he had been convicted, to be served concurrently; Lavelle, two years on each count, to be served concurrently, and a committed $10,000 fine on Count One; and Thaler, one year and one day on each of the three counts on which he had been

convicted, to be served concurrently, and a committed $10,000 fine on Count Two.

I. *The Evidence*

Because appellants have questioned the sufficiency of the evidence, it becomes necessary to state the facts in some detail.[2]

In early August, 1970, more than $1.5 million in United States Treasury Bills of various maturity dates were found to be missing and unaccounted for from the vaults of Brown Brothers Harriman & Co., a large New York City banking and brokerage firm. The details of this apparent theft did not appear at trial, and none of the defendants was charged with participating in it. Ten of the bills ultimately identified to be part of the Brown Brothers Harriman theft, with face (matured) values totalling $800,000, first appeared in the possession of Lavelle in mid-September, 1970.[3] Around September 15, Lavelle approached Jacobs, a long-time friend and business associate, showed him one of the bills, and suggested that Jacobs find a way to sell it. According to Jacobs, he first tried to sell the bill

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2. This statement follows, in large part, the government's case as developed primarily from its three principal witnesses, Altschul, Hill and Brassner. In many respects the testimony of Jacobs and Thaler did not differ. With a few but significant exceptions noted below, the defendants' case did not rest so much on controverting testimony of the government witnesses as in asking the jury to draw different inferences therefrom.

3. No explanation was attempted or made at trial how Lavelle, the owner of a silk screen printing business in New Jersey, came into possession of the bills. Lavelle offered no evidence in his defense.

at his brokerage house, which declined since he had not bought it there and advised taking it to a bank. He then went to a savings bank where he maintained an account, which declined to handle the bill since it was not yet due, and advised taking it to a Federal Reserve Bank. Instead he went to the office of his attorney, David Altschul, whom he asked to find a purchaser for the bill and further bills held by Lavelle. In this or a subsequent conversation, Altschul testified, Jacobs first indicated that he expected a "commission" or finders' fee for his participation in any eventual sale.

After Jacobs left, Altschul broached the subject of Jacobs' visit and the sale of the bills to Thaler, a lawyer and New York State Senator with whom Altschul shared office space. Thaler questioned whether the bills were legitimate, to which Altschul replied that Jacobs had gotten them from Lavelle[4] and that Jacobs said they were legitimate. The next day, Jacobs, Altschul and Thaler met in Altschul's office. Jacobs reported that Lavelle had $800,000 worth of bills which he was willing to sell for 40-50% of maturity value, including a 10% fee for the middlemen. The meeting ended with an understanding that Thaler would seek a buyer for the bills, and that the three would share the 10% fee.

With the essential agreement thus set, the next phase centered on the possibility of selling the bills to a client of Thaler named Fred Hill, a prosperous New York real estate dealer. Thaler approached Hill, a longtime friend and client, with a proposal to sell as much as $1,000,000 worth of treasury bills at a great discount. Hill initially dismissed the idea as ridiculous, reasoning that treasury bills – especially those past due – were essentially equivalents of their face value in dollar bills, and that the deal must have hidden defects. At Thaler's

request, however, Hill agreed to meet with a banker to discuss the proposed transaction. On September 30, 1970, Hill and Thaler met with a Mr. Fitzgerald, vice-president of a Chemical Bank branch near Thaler's office. Thaler outlined the deal, telling Fitzgerald that he had a client who had "some problems, mental or tax-wise, I don't know, and wants to handle this this way"; neither Thaler nor Hill, however, mentioned the size of the proposed discount. Fitzgerald, who was not called as a witness, allegedly said that sales at a discount might well be legitimate for tax or other reasons, but that Hill would in any event be adequately protected if he put the bills infor collection and delayed payment until he had himself received payment from the Treasury, thereby, as Fitzgerald thought, dispelling any possibility of the illegitimacy of the bills. They therefore agreed that Hill would leave the bills with the bank for collection; that, upon payment from the Treasury, Hill's buying price would be deposited in a joint account to be set up by Thaler and Altschul; and that the remainder – Hill's profit – would be deposited in his personal account.

Before continuing with the plan, Hill discussed the matter with another attorney and, on the basis of the latter's skepticism, had recurring doubts about the legitimacy of the deal, which he communicated to Thaler. In response and at various later times, Thaler assured Hill that he, Thaler, was personally convinced of the validity of the deal; that he had checked out the deal with a friend or friends in – indeed one of them the head of – the racket squad of a state district attorney's office;[5] and that the original seller was a wealthy

4. Thaler denied that Altschul had mentioned Lavelle then or later. His version was that at all times he thought Altschul was acting solely on behalf of Jacobs, the true owner.

5. Statements of this sort were made on at least two occasions, once to Hill on October 5 and once to Hill's accountant on October 6. At trial the government called as witnesses two lawyers, each of whom testified that he had spoken informally with Thaler at a chance encounter about

client of Altschul who earned over $70,000 a year and whose family Altschul had represented for many years.

Meanwhile, Jacobs and Lavelle met with Thaler and Altschul in the latter's office.[6] Lavelle at this point delivered the entire $800,000 worth of bills to Thaler and Altschul, and agreed upon a formula for the sale: −65% for the buyer, 25% for Lavelle, and 10% to be split among Thaler, Altschul and Jacobs.[7] Both Altschul and Jacobs testified that at no point during this meeting did either Altschul or Thaler question Lavelle about the source of the bills or his reason for selling at such a large discount.

On October 5, 1970, Thaler, carrying $350,000 of the bills, returned with Hill to the Chemical Bank branch. Hill testified that on the way, Thaler, after repeating his assurances of the legitimacy of the deal, mentioned that there was an agreement in which "he, Altschul and a middle-man" were

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the hypothetical problem of disposing of treasury bills at an undisclosed discount. Neither lawyer had had more than two years' experience in the district attorney's office – indeed, one had left that office more than two years before the meeting with Thaler, neither had been the head of the squad, and neither had any experience with stolen securities.

6. The details of this meeting appeared in Altschul's direct testimony as government witness, and were corroborated, at least to the extent of the identity of the persons present, by Jacobs on cross-examination. As indicated in footnote 4, *supra*, this is one of the significant respects in which Thaler's version of the facts was totally at variance with the government's case. He continually emphasized that throughout the transaction he thought that Jacobs was the true owner of the bills and asserted that he neither met nor heard of Lavelle until the fraud was discovered in the summer of 1971.

7. According to Jacobs' testimony, Lavelle's original selling price for the bills was 45-50% of face value, including 10% for middlemen. This price was subsequently rejected as "too high" by Altschul in a telephone conversation with Jacobs. The final 35% figure, to include a 10% commission, was reached in a meeting among Jacobs, Altschul and Thaler. According to Jacobs, Altschul and Thaler informed him that 35% was "the best pri

going to split their commission.[8] At the bank the two were joined by Altschul. Hill showed the bills to Fitzgerald, who indicated that nothing appeared wrong with them on their face.[9] Hill then gave Fitzgerald a letter instructing the bank to present the treasury bills for collection, to place $280,000 of the $350,000 in expected proceeds in a joint account in the names of Thaler and Altschul, and to deposit the rest in Hill's account.[10]

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8. Many of the events involving Hill were recorded in contemporaneous memoranda dictated by Hill and admitted as evidence at trial. One such memorandum contained the following sentence: "Sy [Thaler] also told me that there is a commission involved which a middleman, Altschul, and he split . . . ." During Hill's original testimony at trial, as a government witness, Hill referred to Thaler's part in the commission as a "one-third commission." Subsequently, Hill was recalled as a witness for Thaler. After stating that he had spoken with Thaler in the interim, Hill claimed that the commas in his memorandum indicated that the name "Altschul" was in apposition to the preceding "a middleman," and that Thaler had actually referred only to an agreement between Altschul and Thaler. Hill further stated that his former testimony as to a three-way split was an "error."

9. Fitzgerald did not check with the Federal Reserve System or the FBI to determine whether the bills whose numbers corresponded with the numbers on the Thaler-Altschul bills had been stolen. An employee of the New York Federal Reserve Bank, called by Thaler, testified that if a bank official were to make such a request the Reserve Bank would check the number against lists of stolen securities maintained by them. He further stated that, in general, anyone presenting a recently due treasury bill at the Reserve Bank would be paid immediately without a check against the lists, provided that the bill appeared valid on its face.

10. The reason for the discrepancy between those percentages and the earlier instructions that only Hill's buying price should be placed in the joint Altschul-Thaler account is explained below.

As will also appear later, in neither stage of the sale of the bills was Thaler content with one-third of the 10% commission. Apparently without the knowledge of Altschul or the other participants, Thaler on October 5 also signed an agreement with Hill that he would share equally in Hill's 65% profit. Hill testified that Thaler was to place his one-third of the 10% commission in the pot that was to be so divided.

The next day, October 6, 1970, Thaler and Hill placed some of the remainder of the $800,000 in bills in a safe deposit box at a branch of the Manufacturers Hanover Trust Company. Later that day, the two met with Hill's accountant who opined, as had Hill's other advisers, that the size of the discount could only indicate shady dealing. At Thaler's request and in order to calm Hill's fears, Altschul wrote Hill a letter indicating that he knew Jacobs and his family well.[11]

On October 7, 1970 Fitzgerald advised Hill that the Treasury Department would not accept the past due bills[12] without receiving a certificate of ownership. Two days later, Thaler and Hill delivered a completed certificate, prepared by Thaler and signed by Hill, showing that Hill had purchased the bills from Altschul. This document, *the only communication ever submitted by defendants to the Treasury Department*, indicated that Hill had purchased $250,000 of bills for $225,000 – a discount of only 10% as against the 20% reflected in Hill's letter of instructions to Fitzgerald and the intended 65%. At the same time they left a further $150,000 in

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11. Although there was no explicit testimony as to the purpose of this maneuver, it is apparent from the record that Hill believed Jacobs to be the true owner of the bills and that Thaler and Altschul intended him to think this. At one point, according to Hill's testimony, Hill was in Thaler's office on unrelated business when Jacobs happened to be visiting Altschul. Hill testified that Altschul introduced Jacobs as the man Altschul "got the Treasury Bills from." If the testimony of Altschul and Jacobs was credited, Thaler knew this to be grossly misleading.

12. Three of the treasury bills involved in the transaction, totaling $250,000 in face value, were due on November 5, 1970. The other seven bills, totaling $550,000 in face value (including $250,000 worth of the bills originally deposited with the Chemical Bank), had become due on September 3, 1970.

November 5, 1970, bills for collection, raising to $500,000 the maturity value of bills left with the bank. About the same time, Thaler prepared on Altschul's letterhead two letter agreements between Altschul and Hill covering the ten bills. The first letter, dated October 5, 1970, covered $250,000 in past due bills at a purported purchase price of $225,000, and thus conformed with the information on the certificate of ownership; the second, dated October 13, 1970,[13] referred to a sale of bills, some past due and some unmatured, totalling $550,000 at a purchase price of $55,000. The two letters together thus reflected a total sale of $800,000 in bills at a price of $280,000, or 35% of face value. Both letters were eventually signed by Altschul and Hill.

According to Jacobs' and Altschul's testimony, Jacobs, Altschul and Thaler also met on October 8, 1970, and signed a written agreement to share equally a 10% commission on the sale of the bills. Each party, received a signed original of the agreement.[14]

On October 14, Fitzgerald informed Hill that Altschul, the listed source of Hill's treasury bills, would also have to file a certificate of ownership for the $250,000 in past due bills first put in for collection. Hill called Thaler, who in turn relayed the information to Altschul. Altschul agreed to sign the needed certificate; however, when he and Thaler approached Jacobs with a similar request, apparently reasoning that a certificate from him would ultimately be called for, Jacobs refused. Thaler

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13. Altschul testified that both letters were presented to him on the same day, and that he did not assist in their preparation.

14. As will appear in more detail in Point V below, a photocopy of Jacobs' signed original unexpectedly appeared at trial as the government's much-discussed Exhibit 57-V. Thaler insisted that no agreement was ever made or signed and that the photocopy was a forgery.

reported this development to Hill by telling him that *Altschul* refused to sign a certificate, and suggested that the prearranged deal might continue with respect to the $250,000 in unmatured, November 5, 1970, bills (for which, apparently, no certificate of ownership would be required). Hill at first accepted the revised plan, and the $250,000 in past due bills deposited with the bank (together with $300,000 in bills still held by Thaler) were returned to Jacobs and Lavelle. However, before the unmatured bills remaining with the bank were actually presented for collection, Hill's sense finally asserted itself and, deciding that "the failure to supply the affidavit was a sure sign of something being wrong somewhere," he rescinded the whole deal. On October 22, 1970, Hill withdrew the $250,000 in November 5 bills from the bank and delivered them to Thaler and Altschul in return for a letter from Altschul acknowledging that "all of our transactions relating to United States Treasury Bills are at an end."

Thus frustrated in their first attempt, and newly aware of the relative difficulty in collecting past due bills without extensive documentation, the conspirators sought an alternative means of cashing the $250,000 in November 5 bills before the due date. Sometime prior to November 4, 1970, Thaler approached a friend and client named Jules Brassner, an art dealer and lighting fixtures manufacturer. Thaler told Brassner an essentially similar but less complete version of the story earlier told Hill: Thaler and his associate, Altschul, knew a "Park Avenue millionaire" who wanted to sell $250,000 worth of treasury bills at a 50% discount; if Brassner would only deposit the bills (which, he was told, were "the same thing as American currency, as your dollar bill"), he and Thaler could share equally in the 50% profit thus generated. Upon Brassner's agreement to the plan, Thaler informed Altschul, who in turn

procured from Jacobs the three unmatured bills totalling $250,000 in face value. On November 4, 1970, Altschul, at Thaler's request, signed a bill of sale from himself to Brassner for the bills at a purchase price of $117,000.[15] The next day, Thaler and Brassner entered into a written agreement, prepared by Thaler, in which they agreed to share equally in the profits from the sale and that Thaler's share would be distributed according to his instructions.[16] Thaler then delivered the treasury bills to Brassner. Apparently to the surprise of Thaler and, so far as the testimony reveals, utterly without any knowledge on the part of the other conspirators, Brassner subsequently[17] took the bills to his bank in Connecticut and put them in for collection. Within a week they were paid.[18]

The remaining task was the pleasant one of distributing the profits. This, as other aspects of the transaction, took a rather complex form. On November 17, 1970, Brassner, at

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15. The $117,000 figure – which allowed a slightly greater discount than the 50% originally mentioned to Brassner, but was substantially short of the 65% to which the conspirators had earlier agreed – apparently was selected by Thaler alone. As will appear below, see note 21 *infra*, the disparity allowed Thaler and Altschul to increase their yields.

16. See note 10, 2s,supra.

16. See note 10, *supra.*

17. Only two of the three bills handled by Brassner were deposited for collection on November 5. In spite of the fears resulting from the earlier request for a certificate of ownership for past due bills, Brassner deposited the third bill on November 12 and collected it without difficulty.

18. No reason for this fateful trip across the state line appears in the testimony. Brassner testified that he had substantial business interests and at least one bank account in New York City.

Thaler's request, wrote a check to Altschul for $117,000, the agreed purchase price. In addition, Brassner wrote Thaler three checks totaling $66,500,[19] representing Thaler's half of the $133,000 profit generated by the sale.[20] On the same day, Thaler delivered the $117,000 check to Altschul, who deposited it in his special attorney's account, and subsequently drew a series of eight checks to Thaler, Jacobs (part of which was intended to go to Lavelle) and himself.[21] Jacobs deposited a check for $62,500 representing Lavelle's share in his own personal checking account and thereafter wrote out a check to Lavelle for the same amount. Apparently this check was deposited by Lavelle in his own account. Two days later, however, Lavelle, pursuant to a procedure earlier arranged by Jacobs, made out a check of his own for $62,500 to one Ben

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19. Only two of these checks were made out directly to the order of Thaler. A third was made out to Parke-Bernet Galleries for Thaler's use in purchasing a Corot painting.

20. Neither Brassner nor Altschul knew that Thaler had been sharing profits with the other. This fact appeared to each only after the investigation into these events began in the summer of 1971.

21. Calculation of the total profits received by each party to the transaction is complicated by the fact that some parties were paid according to the original 65-25-10 ratio, whereas others received increased payments reflecting the fact that Brassner made only a 53.2% profit. Lavelle was paid $62,500 representing 25% of the $250,000 collected. Jacobs was paid $8,334 as his third of the 10% commission. Altschul, who must have known upon receiving Brassner's check that the bills had been sold for only $117,000, eventually received $19,333, and Thaler's share of the "commission" totaled $26,833. The size of the last two shares (the distribution of which extended into February, 1971) was known only to Altschul and Thaler themselves. Thus, including Thaler's share in Brassner's profits, the final distribution (but see note 23 *infra*) was as follows:

Thaler	$93,333
Brassner	66,500
Lavelle	62,500
Altschul	19,333
Jacobs	8,334

Schneider, an accountant acquaintance of Jacobs. Schneider, together with Jacobs' brother Donald and Lavelle,[22] went to Schneider's bank where Schneider deposited Lavelle's check, drew a check on himself for $62,500 in cash, counted out 10% ($6,250) to himself as a commission for cashing the check, and turned the remainder over to Lavelle.[23]

During the summer of 1971 the three treasury bills collected by Brassner in November, 1970, were at long last determined by the Treasury Department to be stolen, and investigation traced the chain of possession to the defendants. In late July, Thaler and other defendants were interviewed by representatives of Brown Brothers Harriman's insurance company and of the FBI, two of whom testified for the government. In September and November, 1971, Thaler was called before a grand jury to testify concerning his role in the disposition of the bills. In addition to asserting, as he did throughout the investigations and subsequently would do during the trial, that he had no idea that the bills were stolen

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22. Schneider testified that Donald Jacobs introduced a man named Lavelle. He could not, however, swear that the "Lavelle" he then met was the same as the defendant Lavelle who appeared in court. But it is undisputed that the defendant Michael Lavelle wrote the check to Schneider which the latter deposited.

23. Schneider testified that when he asked Jacobs why he did not cash the check himself, Jacobs replied, "Better you shouldn't know." Jacobs subsequently denied having made this statement, and testified further that he did not realize that the $62,500 which he arranged to cash for Lavelle represented the same $62,500 he had given Lavelle two days earlier. He admitted, however, receiving $3,000 for arranging the transaction.

and always thought Jacobs to be the owner, on September 24 Thaler categorically denied ever having met or heard of Lavelle in the fall of 1970 and further stated flatly that he had not signed a written agreement (or had an agreement of any sort) with Jacobs and Altschul or either of them.

II. *Sufficiency of Evidence of Theft.*

To take first things first, appellants attack the convictions on the conspiracy and substantive counts on the ground of insufficiency of the evidence to show that the treasury bills were in fact stolen from Brown Brothers Harriman, as distinguished from having accidentally disappeared. But we have held under this very statute that "unexplained disappearance of carefully-handled, closely-guarded documents suffices to support an inference of theft." *United States v. Izzi*, 427 F.2d 293, 297 (2 Cir.), *cert. denied*, 399 U.S. 928 (1970). See also *United States v. Owens*, 420 F.2d 305 (2 Cir. 1970). And in *United States v. Fistel*, 460 F.2d 157, 162-63 (2 Cir. 1972), we applied that same principle to a statute, 18 U.S.C. §2113(c), which imposed the arguably stricter test of proof that property had been "taken" from a bank. Appellants' first contention thus fails.

III. *Sufficiency of Evidence of Guilty Knowledge.*

Appellants' claim of insufficiency of evidence to prove guilty knowledge could be rejected simply on the basis of the long established rule that

> Possession of the fruits of crime recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence.

Wilson v. United States, 162 U.S. 613, 619 (1896) – a principle we have often applied. *See, e.g., United States v. DeSisto*, 329 F.2d 929, 935 (2 Cir.), *cert. denied*, 377 U.S. 979 (1964); *United States v. Izzi, supra*, 427 F.2d at 297. Moreover, the government in this case introduced substantial evidence to rebut the defendants' attempts to demonstrate innocent possession.

So far as concerns Thaler, the record not only was sufficient for a finding of guilty knowledge but fairly shrieked of it. We start with an attorney, who at the time was a member of the New York State Senate's Committee on Banking, allegedly believing that the lawful holder of treasury bills, matured or about to mature, would sell them at a discount, not of 10%, although even that would be hard to understand, but of 65%! His explanation that he believed this might be done for tax reasons increases rather than removes the inference of guilty knowledge;[24] even a lawyer not expert in the intricacies of tax law must know that no net savings can be accomplished by selling at $35 securities that must have cost $100 or close to it and could be collected or sold for that amount. Thaler knew that Hill's lawyer and accountant thought the transaction most

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24. This is true notwithstanding the soothing remarks by Fitzgerald. The latter was not told that the discount was to be 65%, and an attorney does not need guidance from a bank manager on the significance of an offer to dispose of treasury bills for 35% of what the Treasury would pay.

suspicious, yet he closed his eyes to all the storm signals so apparent to them. The alleged consultations with the assistant district attorneys again make the case worse rather than better; the jury was entitled to believe these off-the-cuff conversations with lawyers whose only qualification was their present or past official position were designed only to beguile Hill, to provide the facade of a defense if the shady dealings were discovered, or both. Perhaps most damning of all was the concoction of a certificate to be presented to the Treasury which showed a discount of only 10%, and the preparation of the letter agreements of October 5 and 13, one showing a 10% discount on the $250,000 of past due bills and the other of 90% on $550,000 of other bills. Beyond all these facts and others is the simple but devastating question: With all the suspicious circumstances here present and the doubts expressed by Hill's lawyer and accountant, why did not Thaler take one of the simple means that would have led to revelation of the truth? Thus far, it should be noted, we have cited only facts which Thaler admitted or were established by uncontroverted proof. But the jury was also entitled to draw inferences from such matters as Thaler's denial of an agreement with Jacobs and Altschul (and, in his grand jury testimony, even of an agreement with Altschul) when, apart from all else, the division of the proceeds demonstrated the contrary, and indeed from the many contradictions between Thaler's testimony and that of other witnesses.

As against all this, Thaler's counterarguments that if he had guilty knowledge, he would not have gone to the Chemical Bank, dealt with so many people, or left so much in the way of written evidence fall exceedingly flat. It was at Hill's insistence that he and Thaler went to the Chemical Bank, and the use of checks rather than cash is easily explicable on the basis that a

demand for the latter would have created more doubt in the already doubting Hill as well as in the incredibly complacent Fitzgerald and even the rather eager Brassner. We could go on with Thaler's admissions and untrue statements to the insurance and FBI investigators and other matters, but it is kinder not to do so.

While the evidence supporting the inference of guilty knowledge recognized in the *Wilson* case, *supra*, 162 U.S. at 619, was not so overwhelming in the cases of Lavelle and Jacobs, it was strong indeed. Lavelle, a small businessman, suddenly turns up in possession, not of a few cartons of radios, but of $800,000 of treasury bills some two months after they had been stolen. Such possession, soon after theft of the bills, itself was circumstantial evidence of knowledge that they were stolen. *United States v. Izzi,supra,* 427 F.2d at 297. Instead of attempting to cash them directly, the normal course if believe he was the lawful owner, he goes to his friend Jacobs. When Jacobs asks the source, Lavelle says it is not Jacobs' concern. Jacobs proceeds nonetheless. When he finds himself unable to dispose of the first bill through his broker or savings bank, he disregards the advice to go to the Federal Reserve Bank but consults Altschul. He then enters in negotiations which lead to an agreement for the sale of matured or maturing treasury bills at a price which would yield Lavelle only 25% of their face value! Yet Lavelle and Jacobs, while perhaps not so sophisticated as Altschul and Thaler, were businessmen, not school children; the nature of a treasury bill is not so arcane as to lie beyond common understanding. Beyond all this is the series of complex maneuvers in connection with the final distribution, along with Jacobs' extraordinary testimony that he did not associate Lavelle's $62,500 check to Schneider with his earlier check of precisely the same amount to Lavelle, and what

Schneider testified to have been his answer to the inquiry why he did not cash Lavelle's check himself: "Better you shouldn't know." Better the jury could have found, indeed. Appellants' arguments that perhaps Lavelle's maneuvers, and Jacobs' assistance in them, might have been due to a desire by Lavelle to cheat his wife or the Internal Revenue Service rather than to conceal the proceeds of a sale of stolen securities were for the jury.

IV. *The Conspiracy Count.*

The most serious legal questions raised on appeal concern the sufficiency of the evidence to sustain the conspiracy count and the judge's instructions thereon.[25]

The parties are in agreement on one point. Although Brassner's transportation of the treasury bills to Connecticut sufficed for appellants' convictions on the substantive counts, even though this was unexpected by appellants, *United States v. Crimmins*, 123 F.2d 271 (2 Cir. 1941); *United States v. Vilbotti*, 452 F.2d 1186 (2 Cir. 1971), *cert. denied*, 406 U.S.

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25. Although only Lavelle and Jacobs were convicted of conspiracy, Thaler urges that if the Government failed to establish a conspiracy within 18 U.S.C. §371, much of the evidence against him was erroneously admitted. In view of our conclusions we need not dissect the evidence to determine how much, if any, consisted of declarations, the admissibility of which would hinge on proof of conspiracy, as distinguished from acts, see *Lutwak v. United States*, 344 U.S. 604, 617 (1953), or consider whether proof of an agreement to effect a criminal act would not suffice to invoke the hearsay exception for declarations of a conspirator in furtherance of the conspiracy even though the agreement was not within the *federal* conspiracy statute. *Cf. United States v. Annunziato*, 293 F.2d 373, 380 n.4 (2 Cir.), cert. denied, 368 U.S. 919 (1961).

947 (1972), it would not, under the rule in this circuit,[26] sustain a conviction for conspiracy to cause the bonds to be transported in interstate commerce. Judge L. Hand made the point in *Crimmins*, *supra*, 123 F.2d at 273, with customary incisiveness:

> While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes there is a light to run past.

Judge Gurfein made this completely clear to the jury.

The court submitted the conspiracy charge on two theories. One was that the jury might find that a purpose of the conspiracy was to cause the treasury bills to be transported to Washington, D.C., for payment by the Treasurer of the United States. The other was that the jury might conclude that an objective of the conspiracy was "to defraud the United States, or any agency thereof in any manner or for any purpose," 18 U.S.C. §371, to wit, by causing payment of the treasury bills to be made to someone not the rightful owner.

We are unable to sustain the former theory. The bills say on their face that they are payable on presentation "to the Treasurer of the United States *or to any Federal Reserve Bank.*" (Emphasis supplied.) All the testimony was to the effect that the defendants meant to use the latter method of collection; indeed we should suppose that direct presentation to the

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26. This is criticized in Developments in the Law – Criminal Conspiracy, 72 Harv. L. Rev. 920, 937-39 (1959).

Treasurer was quite unusual. The manager of the government bond department of the Federal Reserve Bank of New York testified that if a treasury bill is paid, whether at a window or by credit to a member bank, the Federal Reserve Bank charges the Treasurer, perforates and voids the bill, and sends it to Washington in that condition. In *United States v. Teresa*, 420 F.2d 13, 17 (4 Cir. 1969), *cert. denied*, 397 U.S. 1063 (1970), the court held that causing bills to be transported to Washington in such condition would not be a substantive violation of 18 U.S.C. §2314 since they would no longer be "securities," as that term is defined in 18 U.S.C. §2311. Not disputing the correctness of that holding, the government urges that "in a conspiracy count such as is involved here, the only question is what the parties contemplated not what actually occurred," and that, as is rather obviously true, the defendants knew nothing of the Federal Reserve Bank's procedure for perforation and voiding. While it is quite possible, although not entirely clear, that conspirators may be found guilty of conspiracy when the object of their agreement is legally or factually impossible, *compare Beddow v. United States*, 70 F.2d 674 (8 Cir. 1934), with *Ventimiglia v. United States*, 242 F.2d 620, 625-26 (4 Cir. 1957),[27] the government's case was nonetheless wanting. Even on the government's theory, there would have to be evidence tending to prove that defendants *thought* that the bills would travel to Washington as "securities," and of this there was none.

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27. Developments in the Law, *supra*, 72 Harv. L. Rev. at 945, concludes that neither the defense of impossibility of fact nor of impossibility of law is consistent with the rationale of the law of conspiracy. According to LaFave & Scott, *Criminal Law* 474-76 (1972), "the conspiracy cases have usually gone the simple route of holding that impossibility of any kind is not a defense."

On the other hand, the jury could properly have found defendants guilty of conspiracy to defraud the United States. Both the Supreme Court and this court have given a broad construction to this phrase in what is now 18 U.S.C. §371. See *Haas v. Henkel*, 216 U.S. 462 (1910); *Hammerschmidt v. United States*, 265 U.S. 182, 187-89 (1924); *United States v. Johnson*, 383 U.S. 169, 172 (1966); *United States v. Peltz*, 433 F.2d 48, 51-52 (2 Cir. 1970), *cert. denied*, 401 U.S. 955 (1971). Defendants argue that no fraud was committed since the United States could not have suffered pecuniary loss from paying the stolen bearer bills. Although under the law in effect in 1970 the government was obliged to pay the owner of a bearer bond that had disappeared if the facts "in the judgment of the Secretary [of the Treasury] would indicate that it has been destroyed or irretrievably lost . . . and will never become the basis of a valid claim against the United States," 31 U.S.C. §738a(a)(1) (1970), and although Brown Brothers Harriman may have been repaid pursuant thereto, the statute required the posting of an indemnity bond, 31 U.S.C. §738a(b). But this takes too narrow a view of the conspiracy statute's reach. Apart from the time and trouble imposed by having to investigate the owner's claim, to effectuate payment and to obtain indemnity (with the possibility of defenses such as undue delay in discovery of the fraud), "[i]t is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated . . . ." *Hammerschmidt v. United States*, *supra*, 265 U.S. at 188. Raising funds and controlling the supply of money through the issuance and redemption of short-term bearer bills clearly reflect "legitimate official action and purpose" of the United States, and just as clearly these are defeated when the government pays someone who has obtained

one of its obligations from a thief.

At first blush our finding of error in the transportation-to-Washington theory would seem to require a reversal at least of Jacobs' and Lavelle's conviction on the conspiracy count, whether still other reversals would be required would depend on the considerations mentioned in note 25, *supra*, and on the continued vitality of the concurrent sentence doctrine in the wake of *Benton v. Maryland*, 395 U.S. 784, 787-91 (1969), but see *United States v. Febre*, 425 F.2d 107, 113 (2 Cir.), *cert. denied*, 400 U.S. 849 (1970); *see generally*, Note, The Federal Concurrent Sentence Doctrine, 70 *Colum. L. Rev.* 1098, 1108-1117 (1970). For the general principle is that, as stated in *Nicola v. United States*, 72 F.2d 780, 787 (3 Cir. 1934): "When two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error." See also *Mills v. United States*, 164 U.S. 644 (1897) ("Which of the two statements was received and acted upon by the jury it is wholly impossible for this court to determine, and as one of them was erroneous . . . the judgment . . . must be reversed . . . ."); *Frank v. United States*, 220 F.2d 559 (10 Cir. 1955); *Smith v. United States*, 230 F.2d 935 (6 Cir. 1956). *Cf. Leary v United States*, 395 U.S. 6, 31-32 (1969).

However, this case falls outside the general rule. If the jury found a conspiracy on what we deem the erroneous view that the evidence supported a conclusion that Lavelle and Jacobs had entered into an agreement to have stolen treasury bills transported to Washington for payment by the United States, it would have found every element necessary to support a conclusion that the defendants had entered into an agreement to defraud the United States by causing it to redeem the bills

from a recipient from a thief rather than from the rightful owner. Whether the jury found Lavelle and Jacobs guilty on the first theory submitted to it, or on the second, or on both, there is thus no uncertainty that the jury found every fact necessary for a valid conviction under 18 U.S.C. § 371. Compare *United States v. Bottone*, 365 F.2d 389, 394-95 (2 Cir.), *cert. denied*, 385 U.S. 974 (1966).[28]

V. *Government's Exhibit 57-A.*

An important point in the government's case on the conspiracy and substantive counts was that Thaler, Altschul and Jacobs had entered into an agreement for a three-way division of the 10% commission to be paid by Lavelle. This negated Thaler's claim that he had supposed Jacobs, a long-time client of Altschul, to be the owner. Moreover, the existence of such an agreement was the basis for Count Four, a false statement to the grand jury, on which Thaler was convicted.

As indicated above, Altschul and Jacobs testified that an oral agreement to this effect was reached in Altschul's office the day after Jacobs had first approached Altschul,[29] and that on October 8 the agreement had been put in writing and signed,

28. It is plain that the acquittal of Thaler on the conspiracy count does not invalidate the use against him of declarations of conspirators in furtherance of the conspiracy. Admissibility of such declarations hinged on whether in the view of the trial judge "the prosecutor has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances." *United States v. Geaney*, 417 F.2d 1116, 1120 (2 Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). Judge Gurfein was amply justified in concluding that the evidence with respect to Thaler's participation met this test.

29. Hill's testimony and written memoranda strongly corroborated the existence of the agreement. See note 8, *supra*.

with each of the three receiving an original, Jacobs' and Altschul's being on onionskin paper. They also testified that, after the collapse of the dealings with Hill and the realization of the difficulty in disposing of the entire $800,000 of treasury bills, Thaler asked Altschul, and Altschul asked Jacobs to return their signed originals for destruction and that they complied—thereby permitting Thaler to do away with what he thought to be the only written evidence of his knowledge that Jacobs was only a middleman.

At the request of the court and in order to lay the basis for testimony by Jacobs as to the contents of the agreement, the prosecutor in cross-examining Jacobs brought out the facts with respect to the destruction of his original. He then inquired whether that was Jacobs' only copy. To everyone's surprise, Jacobs answered in the negative. Jacobs went on to say that he had made a photocopy around the time he had received the original, had kept it in his file, and now had it in his pocket. It then turned out that Jacobs had made another photocopy in the courthouse that morning. The first photocopy became Government Exhibit 57-A for identification, which was ultimately received in evidence;[30] the second photocopy became

30. Thetext of the exhibit reads as follows:

October 5, 1970

Referring to letter dated October 5, 1970, relating of $800,000.00 of treasury bills, the undersigned agree that the sum of $80,000.00 shall be divided equally by and between the undersigned and that DAVID ALTSCHUL and SEYMOUR R. THALER shall issue checks from an escrow account to be opened in the Chase Manhattan Bank, 43rd Street and Fifth Avenue Branch, to each of the undersigned for one-third of the same sum of $80,000.00 within ten days after each of the said treasury bills become due and payable.

Underneath are lines containing purported signatures of Altschul, Thaler and Jacobs, with their names typed below.

Government Exhibit 57 for identification, was left in Jacobs' possession and was destroyed by him after the trial.

Although, in the astonishment created by Jacobs' production of the copies, Thaler's counsel understandably did not object to the admission of Exhibit 57-A, he later moved to strike it, citing 4 Wigmore, Evidence § 1198 (3d ed. 1940), for the proposition that a proponent's intentional destruction of a document bars him from offering a copy. The judge denied the motion.

Wigmore's full text gives reason enough:

> If it should appear that the party desiring to prove a document had himself destroyed it, with the object of preventing its production in court, the evidence of its contents, which he might then offer, could properly be regarded as in all likelihood false or misleading (*ante*, § 291). It is with this extreme case in mind that a few Courts have inconsiderately laid down an unconditional rule that the proponent's intentional destruction of the document *bars him from evidencing its contents* in any other way . . . .
>
> But it is obvious that there may be many cases of intentional destruction which do not present the above extreme features. The intentional destruction may clearly appear to have been natural and proper, or it may be merely open to the bare suspicion of fraudulent suppression; and in such cases the evidence of its contents should be received, subject to comment on the circumstances. . . .

> The view now generally accepted is that (1) a destruction in the ordinary course of business, and, of course, a destruction by mistake, is sufficient to allow the contents to be shown as in other cases of loss, and that (2) a destruction otherwise made will equally suffice, provided the proponent first removes, to the satisfaction of the judge, any reasonable suspicion of fraud. The precedents, however, are not harmonious. (Emphasis in the original.)

It is clear that Wigmore did not favor but strongly opposed the absolute view for which Thaler contends, and did not consider it to be the law. Even if this had been an action between Jacobs and Thaler, the court could properly have found that Jacobs had removed "any reasonable suspicion of fraud" with respect to the destruction of the originals; both he and Altschul testified it was Thaler, not Jacobs, who had demanded this. Compare *United States v. Knobl*, 379 F.2d 427, 439-41 (2 Cir.), *cert. denied*, 389 U.S. 973 (1967). However, even if Jacobs had taken the initiative in proposing destruction of the originals, we see no reason why this should preclude the government from offering a copy as secondary evidence if it succeeded in discovering one—any more than it would be precluded from proving the contents of the agreement by oral evidence.[31]

Receipt of Exhibit 57-A in evidence did not, of course,

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31. Determination of the preliminary issue whether the government should be permitted to offer a copy of the agreement was for the judge. Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165 (1929); McCormick, *Evidence* §53, at 120 (Clearly ed. 1972). After having denied the motion to strike, the judge charged the jury that if they found Jacobs had destroyed the original for a fraudulent purpose, they should disregard Exhibit 57-A. Apart from the lack of objection to the judge's submitting this issue to the jury, unnecessarily giving Thaler a second bite at the apple was surely not prejudicial to him.

prevent Thaler from challenging its authenticity.[32] He did this in several ways. He claimed that the October 5 date was inconsistent with other testimony, and there was no letter of October 5 "relating to $800,000 of treasury bills," and pointed to the reference to an account in the Chase Manhattan rather than the Chemical Bank. Altschul's and Thaler's secretaries testified that they had not typed the agreement. The defense called a witness to testify that in October, 1970, Jacobs worked for Crown Fabrics on the third and fourth floors of a building on West 40th Street, and that the photocopying machines on those floors were Royfax machines. A witness from Royfax who, although not an expert, was allowed, so far as concerned Thaler, to give his opinion, testified that the paper in Exhibit 57A was not of the sort that Royfax had supplied at the time. Also the defense brought out that, in early appearances before the grand jury and in talks with the insurance company and FBI investigators, Jacobs had not mentioned a *written* agreement, although in later grand jury testimony and at trial he had insisted that there was one. The judge put all of this fairly to the jury. Although this was done in the portion of the charge on the count accusing Thaler of having falsely denied the existence of a three-way agreement when testifying before the grand jury, no objection was made on that score and the jury must surely have understood the instruction to relate to the authenticity of Exhibit 57-A for all purposes.

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32. Thaler's basic contention was that Exhibit 57-A was a "mock-up" produced by typing a fabricated agreement above purported signatures (obtained in some way not indicated) and then making a photocopy.

Thaler's motion for a new trial was based primarily [33] on further expert evidence about Exhibit 57-A, which it had allegedly been impossible to assemble in the closing days of the trial. He presented an affidavit of a document expert showing, quite persuasively, that the original of the photocopy was typed on Altschul's typewriter [34] and a detailed affidavit of a research chemist who was manager of Royfax' research and development department in 1970 categorically stating that the paper in Exhibit 57-A was not of any of the types which Royfax was furnishing its customers at the time. The first point was scarcely material. No one had suggested that the typing was done elsewhere than in the Altschul-Thaler suite, and it was for the jury to weigh the reliability of the testimony of the two secretaries and, even if this was deemed reliable, to consider whether the agreement could have been typed by someone

33. The only other basis was an affidavit of Lavelle that he had met Thaler only once, "in or about September, 1970" when Lavelle was in Altschul's office with Altschul and Jacobs. According to the affidavit, all that happened was that Thaler was passing the door and Altschul called him in to shake hands with Lavelle. The judge thought this evidence would not be material in view of the jury's having acquitted Thaler on Count Six of the indictment, which charged that Thaler had lied to the grand jury in saying he had never met Lavelle. We are not so sure about the propriety of drawing inferences from this verdict. But we fully agree with the judge's alternative ground, that a court must exercise great caution in considering evidence to be "newly discovered" when it existed all along and was unavailable only because a co-defendant, since convicted, had availed himself of his privilege not to testify. This is so even if, as alleged, counsel for the co-defendant making a post-trial affidavit exculpating the movant had not allowed the affiant to be interviewed prior to trial.

34. The initial affidavit also asserted that comparison of the type with one document dated October 6, 1970 and another dated February 4, 1972, indicated that Exhibit 57-A was typed after the October 6 document and at a time nearer that of the February 4, 1972 letter. However, a later affidavit confessed that further investigation with respect to the date, based on examination of additional specimen, "has proved inconclusive."

else.[35] The evidence with respect to the paper is more troubling. However, Jacobs' trial testimony as to where the photocopy had been made was equivocal. Moreover, Thaler had been allowed to introduce some evidence that the paper was not of the sort Royfax was then supplying, and his counsel did not then indicate that he was dissatisfied or desired a continuance. In view of all this and the overwhelming evidence of Thaler's guilt, denial of the new trial motion without an evidentiary hearing was not an abuse of discretion.[36]

VI. *The Charge with Respect to Guilty Knowledge.*

Appellants attack the charge with respect to guilty knowledge, which we reproduce in the margin.[37] Their criticisms are particularly directed to the last sentence of the third paragraph.

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35. Thaler's argument that the expert evidence contradicted Altschul's testimony that Thaler prepared the agreement is unimpressive in view of the testimony that the two typewriters were available to all in the office.

36. Thaler again raises questions, as he did on a motion for remand addressed to an earlier panel, about the government's allowing Jacobs to retain Exhibit 57 for identification, which Jacobs subsequently destroyed. Although it would have been much better for the government to have retained custody of this exhibit, there is nothing to suggest that the prosecution had reason to suppose Jacobs would destroy it. Neither has there been any clear indication what purpose would be served if it were still available for examination.

37. The third element of the offense is that the defendant knew that the Treasury Bills had been stolen. Knowledge is not something that you can see with the eye or touch with the finger. It is seldom possible to prove it by direct evidence. The government relies largely on circumstantial evidence in this case to establish knowledge.

In deciding whether a particular defendant under consideration by you knew the bills were stolen you should consider all the circumstances, such as how the defendant handled the transaction, how he conducted himself. Do his actions betray guilty knowledge that he was dealing with stolen securities or are his actions those of a duped, innocent man?

The sentence is drawn from the definition of knowledge in the American Law Institute's Model Penal Code § 2.02(7) (Proposed Official Draft, 1962). This received at least nodding approval in *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969) and perhaps more than that in *Turner v. United States*, 396 U.S. 398, 416 & n.29 (1970), although in neither case did the trial judge use the definition in a charge. This court has also voiced approval of the definition in *United States v. Matalon*, 425 F.2d 70 (2 Cir.), *cert. denied*, 400 U.S. 841 (1970); *United States v. Squires*, 440 F.2d 859, 863 (2 Cir. 1971); and *United States v. Sarrantos*, 455 F.2d 877, 880-82 (2 Cir. 1972), although again in none of these was the "high probability" language actually charged. But a good definition, like the language of a sound judicial opinion, see *Lisabsky v. United States*, 31 F.2d 846, 852 (4 Cir.) (Parker, J.), *cert. denied*, 279 U.S. 873 (1929) is not necessarily appropriate as a charge, and we can think of cases where sole reliance on the ALI language might be improper. The comments to the section (Tent. Draft No. 4,1955) state that the provision was drafted to reach situations

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Guilty knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of a defendant. However, it is not necessary that the government prove to a certainty that a defendant knew the bills were stolen. Such knowledge is established if the defendant was aware of a high probability that the bills were stolen, unless the defendant believed that the bills were not stolen.

Knowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is the fact. The element of knowledge may be satisfied by proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him.

Thus if you find that a defendant acted with reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth the requirement of knowledge would be satisfied, unless the defendant actually believed they were not stolen.

Furthermore, I instruct you that proof of a sale and purchase at a substantially discounted price permits an inference that the parties to the transaction knew of the illicit character of the items sold.

You should scrutinize the entire conduct of the defendant at or near the time the offenses are alleged to have been committed.

where the actor consciously shuts his eyes to avoid knowing whether or not he is committing unlawful acts, *cf. United States v. Benjamin*, 328 F.2d 854, 862-63 (2 Cir.), *cert. denied* 377 U.S. 953 (1964), and language of this sort would often be more useful to a jury than the "high probability . . . unless he actually believed" formulation. But here the judge did not simply charge the Model Penal Code definition. He carefully explicated that although "it is not necessary that the Government prove to a certainty that a defendant knew the bills were stolen," on the other hand "[g]uilty knowledge cannot be established on the part of a defendant." And he emphasized the elements of deliberate closing of the eyes to what would otherwise have been obvious and "reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth. . . ." The charge thus differed greatly from that found erroneous in *United States v. Fields*, 466 F.2d 119 (2 Cir. 1972), involving a comparable knowledge requirement under 18 U.S.C. §659. There the trial judge charged that the "government need not prove that the defendant knew it was stolen property," but need only adduce "evidence, circumstantial or otherwise, [which] tends to prove knowledge . . ." While the "tends to prove" language might effectively lower the government's burden of persuasion, such was not the case with the charge used here. The jurors in this case were made well aware that they had to find either that the defendants actually knew the bills had been stolen or had manifested by their conduct that they were deliberately shutting their eyes to what they had every reason to believe to be the fact.

The few other points advanced by defendants do not merit discussion.

The judgments of conviction and the order denying the motions of Thaler and Lavelle for a new trial are affirmed.

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty ninth day of March, one thousand nine hundred and seventy three.

United States of America,

Plaintiff-Appellee,

v.

David Altschul, Herbert R. Jacobs, Michael P. Lavelle, Seymour R. Thaler,

Defendants,

Herbert R. Jacobs, Michael P. Lavelle, Seymour R. Thaler,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellant Seymour R. Thaler by notice of motion dated March 19, 1973, to stay the issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari be and it hereby is granted

C-1

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of April, one thousand nine hundred and seventy-three.

Present:
HON. HENRY J. FRIENDLY,
Chief Judge,
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,
Circuit Judges

United States of America,

Plaintiff-Appellee,

v.

David Altschul, Herbert R. Jacobs, Michael P. Lavelle, Seymour R. Thaler,

Defendants,

Herbert R. Jacobs, Michael P. Lavelle, Seymour R. Thaler,
Defendants-Appellants.

72-1897, 72-2006 & 72-2318

A petition for a rehearing having been filed herein by counsel for the appellant, Seymour R. Thaler,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

D-1

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of April, one thousand nine hundred and seventy-three.

Present:
HON. HENRY J. FRIENDLY,
Chief Judge,
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,
Circuit Judges

United States of America,

Plaintiff-Appellee,

v.

David Altschul, Herbert R. Jacobs, Michael P. Lavelle, Seymour R. Thaler,

Defendants,

Herbert R. Jacobs, Michael P. Lavelle, Seymour R. Thaler,
Defendants-Appellants.

72-1897, 72-2006 & 72-2318

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Seymour R. Thaler, and no active circuit judge having requested that a vote be taken on said suggestion

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1575

SEYMOUR R. THALER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner argues that the trial court's instructions regarding (1) guilty knowledge and (2) conspiracy were erroneous.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of having dealt in stolen securities which had moved in interstate commerce and of having knowingly defrauded the United States by causing the stolen securities to be presented for payment, in violation of 18 U.S.C. 2314 and 2315. He was also convicted on one count of having knowingly made false material declarations before the grand jury, in violation of 18 U.S.C.

1623.[1] He was sentenced to imprisonment for a year and a day on each count, the sentences to run concurrently, and was fined $10,000 on the count charging a violation of 18 U.S.C. 2314. The court of appeals affirmed.

Petitioner's contentions here are fully answered in the exhaustive opinion of the court of appeals (Pet. App. B), on which we rely. We wish, however, to add the following comments.

1. As the court below pointed out (Pet. App. B, pp. 30-32), the guilty-knowledge instruction[2] was proper because the jury was fully apprised that to convict they had to find either that the defendants actually knew that the bills had been stolen, or that they had manifested by their conduct that they were deliberately shutting their eyes to what they had every reason to believe to be the fact.

2. Although two co-defendants were convicted of conspiracy,[3] petitioner was acquitted on that charge. Petitioner apparently argues that, because of an error in one of the instructions on conspiracy, his co-defendants may have been erroneously convicted of

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[1] Petitioner was acquitted on one count charging conspiracy, in violation of 18 U.S.C. 371 (for conspiring to violate 18 U.S.C. 2314 and 2315). His co-defendants were convicted on this count. He was also acquitted on two other counts charging violations of 18 U.S.C. 1623, and a third count charging such violation was dismissed during trial.

[2] This instruction is fully set forth in the opinion of the court of appeals (Pet. App. B, pp. 30-31, n. 37).

[3] See our response to the petition for certiorari of co-defendant Michael P. Lavelle, No. 72-1469, in which the same issue regarding the alleged impropriety of the conspiracy instruction is raised.

that charge, thus allowing the use of evidence against him that would otherwise have been excluded. The court below, however, concluded properly that in the circumstances of this case, even if the jury followed the inaccurate instruction in reaching its verdict, it nevertheless must have found every element necessary to sustain the convictions. There was, therefore, "no uncertainty that the jury found every fact necessary for a valid conviction" under the conspiracy count (Pet. App. B, p.24).

Moreover, the court of appeals correctly found that petitioner's acquittal on the conspiracy court "[did] not invalidate the use against him of declarations of conspirators in furtherance of the conspiracy" (Pet. App. B, p.24, n. 28). Although the jury may have found a reasonable doubt as to his participation in the conspiracy, the introduction of such evidence only requires that the trial court find that "the prosecutor [had] proved participation in the conspiracy, by the defendant against whom the hearsay [was] offered, by a fair preponderance of the evidence independent of the hearsay utterances" (*ibid.*). See *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. lynch* v. *United States*, 397 U.S. 1028. The court below found ample evidence to sustain this conclusion (Pet. App. B, p.24, n. 28).

It is therefore respectfully submitted that the petition for a writ of certiorari, should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

DOJ-1973-07